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80-1720

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PEOPLE VERSUS PORN (Profit of Richard Nixon)

v.

RICHARD MILHOUS NIXON

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

WILLIAM A. JENNINGS
A. LEE SANDERS
100 Park Center Plaza
Suite 520
San Jose, California 95113
408-288-5515

QUESTIONS PRESENTED

I. Whether there is an absolute right of removal of a state court action commenced by citizen taxpayers in a non-diversity case against a former President of the United States for damages and an accounting for breach of fiduciary duty (fraud) under state statutes codifying the common law of trusts?

II. Whether inclusion in the complaint of an allegation of taking the oath of office of President confers exclusive Federal jurisdiction.

III. Whether petitioners have standing to sue as citizens or taxpayers to assert a claim for breach of fiduciary duty?

PARTIES

The parties are People Versus Porn (Profit of Richard Nixon) a non-profit corporation, J. T. Anderson and Madge Van Horn, Plaintiffs/Petitioners and Richard Milhous Nixon, Defendant.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO.

PEOPLE VERSUS PORN (Profit of Richard Nixon) a non-profit corporation, J.T. ANDERSON, & MADGE VAN HORN, PETITIONERS

v.

RICHARD MILHOUS NIXON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, People Versus Porn (Profit of Richard Nixon), J. T. Anderson and Madge Van Horn, hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (No. 79-4129) is not reported. See Appendix

B. The opinion affirms the judgment of the U. S. District Court, Northern District of California (People Versus Porn v. Nixon, D.C. Cal. 1978, 465 F.Supp. 340) denying plaintiffs' Motion to Remand to state court and granting defendant's Motion to Dismiss. See Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioners are citizens and taxpayers who, on May 4, 1978, commenced an action in the Superior Court of the State of California, County of Santa Clara, against former President Richard M. Nixon for compensatory and punitive damages for breach of fiduciary duty (fraud) and for an accounting. (See Appendix C). Damages recovered were to be paid into the General Fund of the United States for reimbursement to the government for costs relating to prosecuting, investigating and adjudicating matters referred to as Watergate, and for profits made in sale of television programs and book publications of facts with regard to Watergate which had been previously concealed from the public.

Mr. Nixon filed a petition for removal in the United States District Court of the Northern District of California and thereafter moved for dismissal for (1) lack of jurisdiction, Rule 12(b)(1), F.R.Civ.P.); (ii) for failure to state a claim upon which relief can be granted (Rule 12(b)(6) F.R.Civ.P.), and (iii) for failure to join a party under Rule 19 (Rule 12(b)(7), F.R.Civ.P.).

Petitioners moved to remand the action to the California Superior Court. Judgment for the defendant was entered on December 29, 1978 denying petitioners motion to remand and granting the motion to dismiss. A Notice of Appeal from the judgment to the United States Court of Appeals for the Ninth Circuit was filed by petitioners on January 29, 1979. Judgment affirming the District Court was entered on December 5, 1980.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT ISSUE FOR REVIEW BECAUSE THE

PETITIONERS DID NOT BASE THEIR ACTION UPON A FEDERAL CLAIM, BUT RATHER ON STATE STATUTES CODIFYING THE COMMON LAW OF TRUSTS, AND THE DEVICE OF REMOVAL HAS THE EFFECT OF CUTTING OFF SUBSTANTIVE RIGHTS OF CITIZENS ACCORDED UNDER CALIFORNIA LAW FOR REMEDYING BREACHES OF TRUST BY PUBLIC OFFICIALS.

In California cases have established the rule that an elected public official can be held liable for civil damages when the official has committed fraud against an individual or group of citizens.

In City of Fort Bragg v. Branden, 41 Cal. App. 227 (1919) the court ruled that the trustee code sections in the Civil Code (CC 2215-2239) apply to elected members of the Board of Supervisors.

In Schoefer v. Berinstein, 149 Cal.App.2d 278, 285 P.2d 113 (1956) the Court ruled that a taxpayer may sue in his representative capacity on behalf of all taxpayers in cases involving fraud, collusion, or ultravires or failure on the part of a governmental body to

perform a duty specifically enjoined. Therein the court struck down a contract where the public officials involved had a personal interest in the contract and also sustained a count for conspiracy to defraud.

That view was followed and upheld in Goqerty v. Cochella Valley Junior College District, 57 C.2d, 727, 21 Cal.Rptr. 806 (1962); Lusk v. Compton City School Board of Education, 252 C.A.2d 376, 60 Cal.Rptr. 426 (1967) and in Lawrence V. City of Santa Rosa, 53 C.2d 282, 1 Cal.Rptr. 339 (1959).

In Harmon v. City and County of San Francisco, 7 C.3d 150, 101 Cal.Rptr. 880 (1972), the court held that an individual municipal taxpayer had standing to seek to avoid the waste of municipal assets, whether he was seeking equitable or legal relief.

The court therein further concluded that the taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultravires or failure to perform a duty specifically enjoined.

In Cleveland Wrecking Co. v. Struck Construction Co., 41 F.Supp. 70, a housing authority was held liable for fraud of the commissioner of the authority when they induced the contractor to enter into a demolition contract.

With regard to Nixon's duty as President, to act in a fiduciary capacity and to comply with the requirements of the Constitution that he obey and uphold the laws of the land, there are several cases that support the proposition that a public official is a fiduciary and owes such duties to the people.

In Terry v. Bender, 143 C.A.2d 1978, 300 P.2d 119, (1956) the court concluded that the officers of a governmental body are trustees of the public good, and may not exploit or prostitute their official positions for private benefit. Therein, the court struck down a public contract wherein the Mayor of the City had a pecuniary interest on the ground that the Mayor thus breached his fiduciary duty to the people.

In People v. Harley, 51 C.A.2d 759 (1942) the court concluded that a public office is a position of public trust as a universal truism.

In Hubbell v. City of Los Angeles, 142 C.A. 2d 1, 297 P.2d 724 (1956) the court concluded that members of a Municipal Council, or any other public body, are at all times trustees of the public welfare. In Silver v. City of Los Angeles, 57 C.2d 39, 197 Cal.Rptr. 379 (1961) the court reaffirmed the rule that a taxpayer may sue in his representative capacity a municipality in cases involving fraud.

It is well established that California law grants to the plaintiffs the right to sue a public official for the breach of his fiduciary duty. It is clear from a close reading of the complaint in the instant case that there are no issues involving federal statutes nor the Constitution, and thus removal was in error.

The absolute right of removal imposed on petitioners is contrary and inconsistent with another federal court decision arising

out of identical circumstances.

Jenkins v. The New York Times and H. R. Haldeman is a similar action commenced in the Supreme Court of the State of New York by a citizen against the former White House Chief of Staff, H. R. Haldeman. Haldeman had written a book entitled The Ends of Power in which he revealed, for his own pecuniary benefit, information obtain while in a fiduciary capacity and which he had failed to reveal while still in office. The action was removed to the U. S. District Court wherein Judge Vincent L. Broderick, on his own motion, found the removal to be improper in that no federal claims were alleged in the complaint and remanded the matter to state court. (See Appendix E.) Subsequently a consent judgment of dismissal was entered on August 17, 1978 based upon an agreement that Haldeman would not personally profit from the publication. The substantive allegations and the issues of law in the instant case are virtually identical with Jenkins v. Haldeman et al, yet the result is

in sharp contrast.

Removal under 28 U.S.C. 1442(a)(1) was also in error. That section is dependent upon defendant's falling within the parameters of the section: "Any officer of the United States . . . for any act under color of such office . . ." Nixon is not an "officer of the United States", but is rather an ex-officer and thus, is not within the purview of this section. The interest of the United States in having a suit against one of its officers heard in a federal court is surely borne from that officers position as a representative of the United States. When a suit is filed against an ex-officer of the United States, such officer is no longer a representative of the nation and the national interest is not involved.

The District Court and appellees rely on Willingham, Warden, et al, v. Morgan, 395 U.S. 402 (1969) in contending that 28 U.S.C. 1442 (a)(1) allows appellees to have this cause heard before the federal courts. However,

in Willingham, supra, the defendants were federal officers at the time of the action, and can be contrasted with the present case where Nixon was a private citizen both at the time of the complaint and at the time of his commission of the acts complained of, i.e. profiting from his prior wrongdoing. Furthermore, in delineating the scope of Sec. 1442(a)(1) the court said:

> "At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." at p. 406-407.

Nixon surely cannot contend that any of the acts complained of, including the acts of cover-up while still President of the United States, were within the scope of a duty to enforce federal law!

II. THE ALLEGATION THAT THE DEFENDANT TOOK THE OATH OF OFFICE AS PRESIDENT DOES NOT CONFER FEDERAL JURISDICTION.

As a reading of the complaint will show the issues raised do not involve the Constitu-

tion, nor any federal statutes, nor make any claims against the federal government nor any officer thereof. Although petitioners refer in the complaint to Nixon's taking of the oath of office as President, this does not cause the action to arise under Article II, Section 1, clause 8 of the Constitution, since the oath is a mere incident of office. See 63 Am.Jur. 2d Sec. 6, Public Officials, Oaths & Bonds.

III. DENIAL OF PETITIONERS' STANDING TO SUE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND DEFEATS THE CONCEPT OF PUBLIC TRUST.

The decision below is in conflict with recent decisions of this Court which accord standing to citizens and taxpayers. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601 (1979); Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264 (1979); Duke Power Co. v. Carolina Environmental Studygroup, Inc, 438 U.S. 59, 98 S.Ct. 2620 (1978); Worth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1975) U.S. v. Scrap, 412 U.S. 669, 93 S.Ct. 2105

(1973). Petitioner have been injured in fact, not in a hypothetical, abstract way, as was true in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 94 S.Ct. 2925 (1974) Here no appropriations are sought to be barred, rather prior expenditures of $19,596,545 (See Appendix F) caused to be unnecessarily expended of taxpayer funds related to Watergate are sought to be recovered. Additionally, the remedy sought would benefit all citizens in enforcing their rights against public officials who breach the public trust.

Other states similarly have affirmed the citizen's right to sue public officials for accounting and for imposition of constructive trust for violation of their fiduciary duties. In Fuchs v. Bidwell (1975) 31 Ill.App.3d 567, 334 N.E.2d 117 the court reversed on other grounds 65 Ill.2d 503, 3 Ill.Dec. 748, 359 N.E.2d 158 (1977). It had been argued that only the Attorney General of Ilinois could bring the action. In rejecting that contention the court quoted from Paepcke v. Public

Building Commission, 46 Ill.2d 330, 263 N.E.2d 11 and said:

> "If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often effectual denial of the right for all time."

The upholding of the public trust is the essence of petitioners' case. Once their action was removed to the federal court, petitioners repeatedly sought the intervention of the Attorney General of the United States to recover for Nixon's breach of fiduciary duty and each request was denied. (See Appendix D.) To deny standing is the equivalent of granting immunity. This court in reviewing immunity in Butz v. Economou, 438 U.S. 478 (1978) said:

> ". . . The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the adminis-

> trator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers. . . . To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."

To deny standing to petitioners seeking to remedy the grievous breach of public trust by a former president is to stand the Constitution on its head--the exact result the Court sought to avoid in Butz, supra.

The doctrine of immunity of the President has been sharply curtailed in Halperin v. Kissinger, 424 F.Supp 838, Cert. granted 48 U.S. Law Week 3750, May 19, 1980 (argued Dec. 8, 1980). As was stated by this Court in Butz, supra, when it quoted from United States v. Lee, 106 U.S. (16 Otto) 196, 220 (1882):

> "No man in this country is so high that he is above the law. No officer

> of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

This court prevented a wrongdoer from profiting from his own wrongdoing through breach of fiduciary duty in U.S. v. Snepp, 444 U.S. 507. The same result should obtain in this case. (See Appendix G.)

CONCLUSION

For the foregoing reasons, the Court should grant the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

William A. Jennings
Attorney for Petitioners

APPENDIX A

ORDER DENYING PLAINTIFFS' MOTION TO REMAND AND GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiffs seek to recoup monies for federal taxpayers for certain federal expenditures on the so-called "Watergate" affair and from the profits Richard Milhous Nixon derived from certain books and speaking engagements based on this period of his Presidency. Plaintiffs' claim is based on the theory that, having taken the Presidential oath of office, United States Constitution, Article II, Section 1, Nixon became a trustee for the class of plaintiffs and that he breached the fiduciary obligations of a trustee, Cal. Civ. Code Sec. 2222, et. seq., by his "Watergate" related activities.

As diversity does not exist between the parites, federal court jurisdiction, if any, must be based on the existence of a federal question. Plaintiffs move to remand to state court on the grounds that the action arises out of the state law of trusts. However,

since plaintiffs sue as a class of federal taxpayers to which a federal officer allegedly owed a fiduciary duty, the claim if any, arises out of the federal Constitution or laws, and the motion to remand to state court must be denied. 28 U.S.C. § 1441. Furthermore, this action raises the question of whether Nixon is entitled to immunity for actions taken under color of office, and this is an issue in which the federal branch has an interest. Willingham v. Morgan, 395 U.S. 402, 406-07 (1968). Therefore, 28 U.S.C. 1442(a)(1) also authorizes removal of this action to federal court.

This action cannot continue in this Court through, because plaintiffs lack standing to sue for these claims. Taxpayers do not have standing to challenge generalized governmental policies, particularly when they do not even allege derogation of the taxing and spending powers of the Constitution. United States v. Richardson, 418 U.S. 166 (1974);

Schlesinger v. Reservists Committee to Stop The War, 418 U.S. 208 (1974). Cf. Warth v. Seldin, 422 U.S. 490 (1975).

ACCORDINGLY, IT IS HEREBY ORDERED that plaintiffs' motion to remand is DENIED:

IT IS FURTHER ORDERED that defendants' motion to dismiss is GRANTED.

Dated: December 22, 1978

Signed: Albert C. Wollenberg
United States District Court

FILED:

Dec. 22, 1978

William L. Whittaker, Clerk

U.S. District Court

Northern District of California

JUDGMENT

Defendants' motion to dismiss without leave to amend having come before the Court, Honorable Albert C. Wollenberg, District Judge, presiding, and the issues having been duly presented by the parties, and it appearing that plaintiffs cannot state a claim for which relief can be granted, and a decision having been duly rendered:

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiffs take nothing, that the action be DISMISSED on the merits, and that the defendants recover of the plaintiffs their costs of action.

Dated: December 22, 1978

Signed: Albert C. Wollenberg

FILED:

December 22, 1978
William L. Whittaker, Clerk
U. S. District Court
Northern District of California

APPENDIX B

MEMORANDUM

Appeal from the United States District Court for the Northern District of California Albert C. Wollenberg, District Judge, Presiding, Submitted November 17, 1980

Before:WRIGHT, CHOY & FERGUSON, Circuit Judges.

Plaintiffs allege that Richard Nixon, as President, breached a fiduciary duty arising out of his oath of office. They seek reimbursement of government expenditures plus profits made by the defendant and punitive damages.

Plaintiffs lack standing to sue either as taxpayers or citizens. Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1973).

The denial of plaintiffs' motion to remand was correct. The right of removal was absolute. Willingham v. Morgan, 395 U.S. 402 (1968).

The dismissal of the action if AFFIRMED.

FILED:
Dec. 5, 1980
Richard H. Deane
Clerk, U. S. Court of Appeals

APPENDIX C

COMPLAINT FOR DAMAGES FOR BREACH OF FIDUCIARY DUTY (FRAUD)

Come now the plaintiffs, and each of them, and for a cause of action allege as follows:

FIRST CAUSE OF ACTION

I

People Versus PORN (Profit of Richard Nixon) is a non-profit corporation composed of individuals who are taxpayers to the United States of America and has its principal place of business in the County of Santa Clara, and its mailing address is P.O. Box 54040, San Jose, California 95154.

II

Plaintiff, J. T. Anderson, is an adult and is a citizen and taxpayer of the United States of America and is a resident of the City of Fremont, County of Alameda, California.

III

The plaintiff, Madge Van Horn, is an adult and is a citizen and taxpayer of the

United States of America and is a resident of the City of San Jose, County of Santa Clara, California.

IV

Plaintiffs, and each of them, bring this action on their own behalf and on behalf of all persons, individual or otherwise, who paid taxes to the United States of America during any period from July 1972 until the present. All monies recovered after reduction for reasonable costs of suit, including reasonable attorneys fees as provided by Section 1021.5 of the Code of Civil Procedure of the State of California, shall be paid into the general fund of the United States of America for the purpose of reimbursing the government of the United States of America for costs incurred in relation to prosecuting, investigating and adjudicating all matters popularly referred to as Watergate.

V

The defendant, Richard Milhous Nixon

(hereinafter referred to as defendant, Nixon) was at all times and remains a resident and citizen of the State of California.

VI

The true identity and whereabouts of defendants, I through C are unknown to the plaintiffs at this time and plaintiffs therefore named said defendants fictitiously since said defendants were at all times involved herein employees or agents of the defendant, Nixon, and subject to said defendant's control and direction.

VII

During the month of January, 1969, the defendant, Nixon, willingly and voluntarily took the oath of office as President of the United States as prescribed in Section 1, Clause 5 of Article II of the Constitution of the United States. Said act constituted knowing and willing acceptance by the defendant, Nixon, through his word and deed, that said defendant agreed to the certain trust

and fiduciary relationship between said defendant and the plaintiffs, individually and on behalf of the class they represent, all as provided in Section 2222 of the Civil Code of the State of California. (Hereinafter all section references will be to the Civil Code of the State of California unless otherwise specified.)

VIII

By reason of the voluntary trust created pursuant to Section 2222 as above alleged, the defendant, Nixon, and the defendants, I through C, were subject to the provisions of Sections 2228, 2229, 2230, 2231, 2234, 2237 and 2238.

IX

Section 2228 provides as follows:

> "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slighest misrepresentation, concealment, threat, or adverse pressure of any kind."

X

Section 2229 provides as follows:

"A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

XI

The pertinent portion of Section 2230 provides as follows:

"Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present, or contingent, adverse to that of his beneficiary."

XII

Section 2231 provides as follows:

"A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary."

XIII

Section 2234 provides as follows:

"Every violation of the provisions of the preceding sections of this article (including Sections 2228, 2229, 2230 and 2231) is a fraud against the beneficiary of a trust."

XIV

The defendants, and each of them, intentionally and willfully misrepresented to the plaintiffs, individually and as representatives of all taxpayers as hereinabove alleged, that they did not take part, in any way, in the coverup of any fact or facts pertaining to the break-in and burglary of the Headquarters of the Democratic Party on or about June 17, 1972, popularly known as Watergate. Said misrepresentations occurred continuously from the period beginning June 23, 1972 and continuing until the present. Said misrepresentations constituted a violation of Section 2228 and 2234.

XV

From and after June 23, 1972 until the present the defendants, and each of them, intentionally and willfully concealed from the plaintiffs, individually and on behalf of persons similarly situated as alleged above, information about such facts known to said defendants with regard to Watergate and which

have been subsequently, and within three years past, sold to certain television networks, promoters, producers, newspaper publishers, magazine publishers, book publishers, dealers and distributors and others for a profit, all in violation of Sections 2228 and 2235.

XVI

The defendants, and each of them, have dealt with the property and interest of said trust for their own benefit and in violation of Sections 2229 and 2234.

XVII

From June 23, 1970 until the present, the defendants, and each of them, have taken part in transactions concerning the trust, wherein said defendants had an interest, both present and contingent, adverse to that of plaintiffs, and all other persons similarly situated, who were and are beneficiaries of said trust, all in violation of Section 2230 and 2234.

XVIII

The defendants, and each of them, have

intentionally and willfully used the influence which their position as trustees gave them, to obtain advantage from the plaintiffs and all other persons similarly situated as hereinabove alleged, who are beneficiaries of said trust all in violation of Sections 2231 and 2234.

XIX

The defendants, and each of them, have intentionally and willfully violated Section 2234 and have committed fraud against the beneficiaries of said trust relationship, including the plaintiffs and all persons they represent.

XX

Plaintiffs are informed and believe and based upon said information and belief allege, that the defendants, and each of them, have derived benefits from the breach of said duties as heretofore alleged in an amount in excess of $1,300,000 and that said amount will increase henceforth.

XXI

Said breaches of fiduciary duty by the defendants, and each of them, as heretofore alleged, have been continuing and continue at present and commenced prior to August 8, 1974, but were consummated and realized subsequent to August 8, 1974, all for the wrongful benefit of the defendants, and each of them, as trustees as heretofore alleged.

XXII

The defendant, Nixon, and the defendants I through C, and each of them, did willfully and intentionally breach said fiduciary duties as heretofore alleged, and are liable to the plaintiffs, individually and on behalf of the class of persons they represent, for damages by way of example and punishment in an amount equal to 20% of the net worth of the defendant, Nixon and 20% of the net worth of each other defendant held so liable.

WHEREFORE plaintiffs pray for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

XXIII

Plaintiffs reallege all of the allegations contained in Paragraphs I through VII and XIV through XXI of the First Cause of Action and incorporate the same by reference as though set out in full.

XXIV

Defendants, and each of them, have intentionally used and dealt with trust property for their own benefit and have done so for purposes unconnected with the trust, as hereinbefore alleged.

XXV

Plaintiffs, individually and on behalf of the class they represent as hereinafter alleged, demand that the defendants, and each of them, account for all profits made, with interest, and to provide an accounting as prescribed by Section 2237.

WHEREFORE, plaintiffs pray judgment for

1. Compensatory damages in accordance

with proof but equaling no less than $1,300,000;

2. For punitive damages in the amount of 20% of the total net worth of the defendant, Nixon, and of each other defendant held liable therefor;

3. For costs of suit, including reasonable attorney fees;

4. For whatever other relief to the Court seems just.

Dated: May 2, 1978

Signed: A. Lee Sanders

FILED:

May 4, 1978
John Kazubowski, Clerk
Superior Court
County of Santa Clara, State of California

APPENDIX D

LETTER FROM DEPARTMENT OF JUSTICE, BARBARA ALLEN BABCOCK, ASSISTANT ATTORNEY GENERAL

April 9, 1979

Dear Mr. Jennings:

The letter is in reply to your correspondence of March 14, 1979 to Mr. Stuart Schiffer and of January 28, 1979 to the Attorney General to which the Criminal Division, Department of Justice, has already responded.

The Civil Division does not believe there is a basis for intervening at this time in the civil action of People versus PORN, (Profit of Richard Nixon) v. Richard M. Nixon, USDC N.D. Calif. C781537ACW. Your January 28 letter asserts that the legal precedent for the aforementioned civil action is United States v. Snepp, 456 F.Supp, 176 (E.D.VA 1978) C.A. No. 78-1651 (4th Cir. decided March 20, 1979). In the Snepp case, the United States sought recovery of Mr. Snepp's profits because he published his book in violation of a

specific secrecy agreement executed by him as a condition of being employed by the Central Intelligence Agency which obligated Mr. Snepp to submit his writings to the CIA for review prior to publication. Mr. Nixon, however, did not become President as a result of his signing such a secrecy agreement. A civil suit by the United States against Mr. Nixon in the circumstances described by you, therefore, would be inappropriate.

Very truly yours,

Barbara Allen Babcock
Assistant Attorney General

APPENDIX D continued

LETTER FROM ALICE DANIEL, DEPT. OF JUSTICE

Dear Mr. Jennings:

This letter is in reply to your correspondence of October 18, 1979, to the Attorney General which requested that the United States intervene as a plaintiff in the appellate proceedings of People Versus PORN (Profit of Richard Nixon) v. Richard M. Nixon, USCA 9th No. 79-4129.

Last year you requested that the United States intervene in the above-referenced action during the district court proceedings. Former Assistant Attorney General Barbara Allen Babcock responded to your request on April 9, 1979, by stating that the United States would not intervene in the civil suit. After a review of your materials and the legal and factual issues raised in the litigation, it has been concluded that the decision previously reached and communicated to you remains unchanged.

Sincerely,

APPENDIX E

VERIFIED COMPLAINT, NO. 3106/78
DEBRA JENKINS, against THE NEW YORK TIMES and H.R. HALDEMAN,

Plaintiff, DEBRA JENKINS, by and through her attorneys, Berney & Cousins, respectfully shown to this Court and alleges upon information and belief, the following:

FIRST CAUSE OF ACTION FOR A PERMANENT INJUNCTION

1. At all of the times herein mentioned, plaintiff, DEBRA JENKINS, was and still is a citizen of the United States of America.

2. At all of the times herein mentioned, DEBRA JENKINS, was and still is a resident of the State of New York, County of New York.

3. At all of the times herein mentioned, upon information and belief, defendant, THE NEW YORK TIMES, was and still is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York.

4. At all of the times herein mention-

ed, upon information and belief, the defendant, TIMES BOOKS, was and still is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York.

5. At all of the times herein mentioned, the defendant, TIMES BOOKS, was a subsidiary, in whole or in part, of the defendant, THE NEW YORK TIMES.

6. That, upon information and belief, the defendant, H.R. HALDEMAN, was appointed White House Chief of Staff by President Richard M. Nixon, in and about 1969.

7. That as White House Chief of Staff, defendant, H.R. HALDEMAN, occupied a position of trust and confidence and owed a duty to the United States Government and to the citizens thereof, arising out of his fiduciary position and duties of trust, honesty and integrity.

8. That defendant, H.R. HALDEMAN, in his appointed capacity as White House Chief of Staff, became aware of certain facts re-

garding the occurrence of what has come to be known as "Watergate" and its attendant circumstances, and knowingly concealed this information from the investigating authorities.

9. That defendant, H.R. HALDEMAN, concealed the facts and evidence from properly vested investigating authorities.

10. That the above mentioned acts and omissions by H.R. HALDEMAN constituted a breach of trust and fiduciary duty owed to the United States Government and the citizens thereof.

11. That on or about January 1, 1975, defendant, H.R. HALDEMAN, was convicted of conspiracy, obstruction of justice and lying under oath in the United States District Court in Washington, D. C., in connection with his above mentioned involvement in the "Watergate" scandal.

12. That defendant, H.R. HALDEMAN, in his appointed capacity as White House Chief of Staff, became aware of certain classified and secret information concerning the domestic

and foreign activities and relationships of the United States Government and the officials and citizens thereof.

13. That defendant, H.R. HALDEMAN, authored a book entitled The Ends of Power.

14. That defendant, H.R. HALDEMAN has transacted business within the State of New York through the authoring, publication, promotion and distribution of The Ends of Power within the State of New York.

15. That defendant, H.R. HALDEMAN, has regularly done and/or solicited business in the State of New York through the authoring, publication, promotion and distribution of The Ends of Power.

16. That defendant, H.R. HALDEMAN, has engaged in a persistent course of conduct through the authoring, publication, promotion and distribution of The Ends of Power.

17. That defendant, H.R. HALDEMAN has derived substantial revenue within the State of New York as a result of the authoring, publication, promotion and distribution of The

Ends of Power.

18. That in and about February, 1978, defendant, THE NEW YORK TIMES, published, distributed and promoted within the State of New York, a book authored by defendant, H.R. HALDEMAN, entitled The Ends of Power.

19. That in and about February, 1978, the defendant, TIMES BOOKS, published, distributed and promoted within the State of New York, a book authored by defendant, H.R. HALDEMAN, entitled The Ends of Power.

20. That defendant, H.R. HALDEMAN, upon information and belief, has received, is receiving or is entitled to receive monetary advances, commissions and/or royalties from THE NEW YORK TIMES and/or TIMES BOOKS from the sales of his book entitled The Ends of Power.

21. That in his book, The Ends of Power, defendant, H.R. HALDEMAN, has revealed information he obtained while acting in his fiduciary capacity as White House Chief of Staff for his own pecuniary benefit and that he

failed to reveal the same information while the investigation of "Watergate" and related matters were on going.

22. That in his book, The Ends of Power, defendant, H.R. HALDEMAN, revealed certain classified and secret information concerning the domestic and foreign activities and relationships of the United States Government and the officials and citizens thereof.

23. That plaintiff has been damaged by the acts and conduct of the defendant, H.R. HALDEMAN.

24. That plaintiff has been damaged as a citizen and taxpayer of the United States of American in that the government of the United States and the officials and citizens thereof, have been embarrassed, compromised, demeaned and demoralized by the above-mentioned acts of H.R. HALDEMAN.

25. That such damages will continue to increase as long as defendant, H. R. HALDEMAN continues to receive pecuniary profit from the sales of The Ends of Power.

26. That plaintiff has done nothing that will bar relief on the grounds that he has failed to come into equity with clean hands.

27. That plaintiff herein has no adequate remedy at law.

28. That plaintiff demands that defendants, THE NEW YORK TIMES and TIMES BOOKS, be enjoined and restrained from paying any further monetary advancements, commissions, royalties or other consideration to the defendant, H.R. HALDEMAN, from the sales of The Ends of Power and that all such sums be paid to the General Treasury of the United States.

SECOND CAUSE OF ACTION FOR AN ACCOUNTING

29. That an accounting should be held as to all monies representing advancements, commissions, royalties and/or other valuable consideration paid by defendant, THE NEW YORK TIMES and TIMES BOOKS to the defendant, H.R. HALDEMAN, from the sales of his book, The Ends of Power, and that all such monies be paid to the General Treasury of the United States.

WHEREFORE, plaintiff demands judgment

granting a permanent injunction restraining and enjoining defendant, THE NEW YORK TIMES and TIMES BOOKS from paying any further monetary advancements, commissions, royalties or other consideration to H.R. HALDEMAN from the sales of The Ends of Power and that all such monies be paid to the General Treasury of the United States; together with costs and disbursements of this action.

BERNEY & COUSINS
Attorneys for Plaintiffs
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(212) 349-6771

FILED:
Supreme Court of the State of New York
County of New York

DEBRA JENKINS against THE NEW YORK TIMES COMPANY, TIMES BOOKS and H.R. HALDEMAN

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND THIS ACTION TO STATE COURT

The within action is one brought to prevent the defendant, H.R. HALDEMAN, from profiting from the sale of his book "The Ends of Power" and to restrain and enjoin THE NEW YORK TIMES COMPANY and TIMES BOOKS from paying to H.R. HALDEMAN any further commissions, royalties or fees earned from the sale of this book and to account for all sums already paid to H. R. HALDEMAN from the sale of said book.

The within action was brought in the New York State Supreme Court in and for the County of New York, and assigned Index No. 3106/78 by the New York County Clerk.

The within action was brought in State Supreme Court because it is a court of general jurisdiction and because there is no complete diversity of citizenship between the plaintiff and the defendants as required by 28 U.S.C. 1332.

The plaintiff is a citizen and a resi-

dent of the State of New York residing at 229 East 29th Street, Borough of Manhattan, City, County and State of New York.

THE NEW YORK TIMES COMPANY is a citizen of the State of New York, with its principal place of business at 229 West 43rd Street, in the Borough of Manhattan, City, County and State of New York.

TIMES BOOKS is also a citizen of the State of New York with its principal place of business at 3 Park Avenue, Borough of Manhattan, City, County and State of New York.

Service of process of the summons and complaint in the State Supreme Court action was effected on these defendants at their respective addresses.

Neither defendant, HALDEMAN's notice of filing verified petition for removal, nor the notice of filing of verified joinder in petition for removal of THE NEW YORK TIMES COMPANY and TIMES BOOKS denies that THE NEW YORK TIMES COMPANY and TIMES BOOKS are citizens of the State of New York for purposes of diversity

of jurisdiction.

Clearly, the removal of this action to United States District Court for the Southern District of New York is barred by 28 U.S.C. 1441(b) which provides that, "Such actions shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

Defendants attempt to circumvent 28 U.S.C. 1441 by alleging that plaintiff's complaint is "founded on a claim or right arising under the Constitution, treaties or laws of the United States." A copy of plaintiff's verified complaint is attached to defendant HALDEMAN's notice of filing verified petition for removal as Exhibit A. A careful reading thereof will show that none of plaintiff's causes of action are "founded on a claim or right arising under the Constitution, treaties or laws of the United States." Plaintiff's complaint against the defendants herein is predicated solely upon the common law of the

State of New York and to the extent applicable upon Section 632-a of Chapter 823 of the laws of 1977.

Failing that argument, defendant next assert that THE NEW YORK TIMES COMPANY and TIMES BOOKS are improper and unnecessary parties and that under 28 U.S.C. 1441(c) this action may still be removed to Federal Court because plaintiff is a citizen and resident of the State of New York and defendant, HALDEMAN, is a citizen and resident of the State of California.

It is respectfully submitted that THE NEW YORK TIMES COMPANY and TIMES BOOKS who publish and distribute H.R. HALDEMAN's "The Ends of Power" are not only proper and necessary parties, but absolutely indispensable because if as defendant, HALDEMAN, asserts in his notice of motion to dismiss, this Court has no jurisdiction over him, the only way the plaintiff herein can keep him from profiting from the sale of his book, "The Ends of Power"

is to enjoin THE NEW YORK TIMES COMPANY and TIMES BOOKS over whom this Court admittedly has jurisdiction from paying any further fees, royalties, commissions or profits to H.R. HALDEMAN from the sale of his book.

Moreover, it is clear from a fair reading of plaintiff's complaint that THE NEW YORK TIMES COMPANY, and TIMES BOOKS, were not joined solely to defeat the removal of this case to Federal Court but rather because they are necessary and indispensable parties to the adjuciation of this action. The contract or contracts between H.R. HALDEMAN and THE NEW YORK TIMES COMPANY and TIMES BOOKS makes plaintiff's claims against these defendants inseparable.

Furthermore, while state courts are generally loathe to interpret a federal statute or Congressional act in deference to their counterpart in the federal judiciary, comity also counsels this Court to leave it to a New York State Court to interpret, at least initially, a section no newly enacted

as 632-a of Chapter 823 of the Laws of 1977 upon which our state courts have yet provided no interpretation thereof or guideline for their counterparts in the federal judiciary to follow.

In addition, it is also respectfully submitted that whether or not New York State's long arm statute confers personal jurisdiction over the defendant, H.R. HALDEMAN, should be left to the determination of a State Supreme Court judge.

Accordingly, it is respectfully submitted that plaintiff's motion to remand this case to the New York State Supreme Court pursuant to 28 U.S.C. 1447(c) should be granted in all respects.

Respectfully submitted,

BERNEY & COUSINS
Attorneys for Plaintiff
299 Broadway
New York, New York 10007
(212) 349-6771

APPENDIX E continued

DEBRA JENKINS against THE NEW YORK TIMES COMPANY et al,

ORDER

VINCENT L. BRODERICK, U.S.D.J.

Plaintiff filed this action in Supreme Court of the State of New York, seeking an order enjoining defendants The New York Times and Times Books from paying any further monetary consideration to defendant H. R. Haldeman from the sales of the book The Ends of Power and requiring that all said sums be paid to the General Treasury of the United States.

Defendants removed the action to this court pursuant to 28 U.S.C. Section 1441, alleging that the action arises under the Constitution or laws of the United States, or alternatively that there is diversity of citizenship between plaintiff and defendant Haldeman and that the other named defendants are improper parties. After removal, defendants filed motions to dismiss the complaint (Rule 12(b), F.R.Civ.P.).

Plaintiff has moved for remand to state court. Plaintiff's motion is denied as not in compliance with Rule 9 of the General Rules for the Southern District of New York.

Pursuant to 28 U.S.C. Section 1447(c), the district court may, of its own motion, remand an action which was "removed improvidently and without jurisdiction. . . ." Cutler v. Rae, 7 How. 729, 12 L.Ed. 890 (1849); see also Jacobs v. District Director of Internal Revenue, 217 F.Supp. 104, 106 (S.D.N.Y. 1963). Looking to the face of the complaint, I find that removal was improper in this case. Plaintiff alleged no federal claims in her complaint, and I do not find that defendants The New York Times and Times Books are improper parties.

This action is remanded to the Supreme Court of the State of New York, without costs.

Defendants' motions to dismiss the complaint are denied as moot.

SO ORDERED.

Dated: New York, New York, June 20, 1978

APPENDIX F

THE LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, D. C.

INDENIFYING THE COSTS OF WATERGATE

The task of identifying the costs of Watergate is a difficult one. Most of the media reporting on cost occurred either prior to or during the House Judiciary Committee's impeachment hearings. The Watergate cost discussion at that time centered on the direct costs to the taxpayer of various investigations which were then being conducted. Recent estimates of the cost of Watergate have emphasized other factors, such as the "psychic cost" to the Nation of the scandal, and the possibility that the Federal Government's preoccupation with the situation may have contributed to present economic conditions. Costs of this type are almost impossible to quantify. The purpose of this report, therefore, is to gather all the available, quantifiable Watergate costs in order to make an estimate of the identifiable direct costs of the affair.

All the Watergate costs have not directly been paid by the taxpayer. Broadcasting (Aug. 13, 1973), a magazine covering the activities of radio and television, estimated the commercial networks lost up to ten million dollars in advertising revenue just from broadcasting the first phase of the Watergate committee hearings. These costs include only the direct hearing coverage--not news programming time devoted to the subject. Cost estimates for subsequent coverage, such as the impeachment hearings, is not yet available.

Others found the controversy financially beneficial. For example, the hearings proved beneficial to the educational networks. Broadcasting (Ibid.) reported that the educational channels received almost one million dollars in increased contributions directly related to their coverage of the first phase of the Watergate hearings.

Costs such as the fees paid by defendants to their lawyers in the case, the extra newsprint required to print excerpts from the

tapes in the newspapers, etc., are beyond the scope of this inquiry.

In an effort to gather the identifiable costs of Watergate directly paid by the taxpayer, the Federal agencies which participated in the investigation were contacted, and resolutions providing special funding for congressional committee investigations were examined. The information obtained by this survey is spotty at best. Most Federal agencies do not account for their expenses on a "per case" basis. Some of the agencies released cost data at one point in the controversy, but ceased tracking the issue soon thereafter.

Bearing these caveats in mind, the direct, identifiable, taxpayer financed cost of Watergate found in this survey is $19,596,545. This figure includes both estimates and actual costs which can be broken down into the following broad categories:

SUMMARY OF IDENTIFIABLE WATERGATE RELATED INVESTIGATION COSTS

Congressional Committee Investigations	$ 3,640,573
Federal Agency Investigations	15,396,631
White House Direct Defense Costs	559,341
TOTAL	$ 19,596,545

APPENDIX G

"I made my mistakes, but in all of my years of public life, I have never profited, never profited from public service. I have earned every cent. And in all of my years of public life, I have never obstructed justice. And I think, too, that I could say that in my years of public life, that I welcome this kind of examination because people have got to know whether or not their President is a crook. Well, I am not a crook. I have earned everything I have got." [1]

"With regard to the specific allegations that have been made, I can and do state categorically:

1. I had no prior knowledge of the Watergate operation.

2. I took no part in, nor was I aware of, any subsequent efforts that may have been

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[1] Nixon, Richard M., Memoirs of Richard M. Nixon, November 17, 1973, p. 957.

made to cover up Watergate.

3. At no time did I authorize any offer of executive clemency for the Watergate defendants, nor did I know of any such offer.

4. I did not know, until the time of my own investigation, of any effort to provide the Watergate defendants with funds.

5. At no time did I attempt, or did I authorize others to attempt, to implicate the CIA in the Watergate matter.

6. It was not until the time of my own investigation that I learned of the break-in at the office of Mr. Ellsberg's psychiatrist, and I specifically authorized the furnishing of this information to Judge Byrne.

7. I neither authorized nor encouraged subordinates to engage in illegal or improper campaign tactics.

In the accompanying statement, I have sought to provide the background that may place recent allegations in perspective. I have

specifically stated that executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters under investigation. I want the public to learn the truth about Watergate and those guilty of any illegal actions brought to justice."[2]

"The Committee has the full story of Watergate, insofar as it relates to presidential knowledge and presidential actions."[3]

In drafting the Articles of Impeachment, Articles I, II, and III, the Congress stated:

"In all this, Richard M. Nixon has acted in a manner contrary to his trust as

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[2] Nixon, Richard M., Statements about the Water Investigations, May 22, 1973, Public Papers of the President of the United States, 1973 Volume, p. 162.

[3] Nixon, Richard M., Letter to Peter Rodino, Jr., Chairman, U. S. House of Representatives, Judiciary Committee, dated May 22, 1974.

President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States. (emphasis added).[4]

Leon Jaworski, the special Watergate prosecutor, has pointed out that:

". . . the grand jury named Nixon as an unindicted co-conspirator and that there was evidence that Nixon had conspired to violate 18 U.S.C. 1503--obstruction of justice; 18 U.S.C. 1623--perjury; 18 U.S.C. 201(D)--bribery; 18 U.S.C. 1505--obstruction of a Congressional committee; and, 18 U.S.C. 1510--obstruction of a criminal investigation." [5]

Judge John J. Sirica has said:

"I still have the lingering feeling that

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[4] Congress of the United States, Articles of Impeachment

[5] Leon Jaworski as told to Lloyd Shearer, San Jose Mercury-News, Aug. 20, 1978.

no matter how great his personal loss, Nixon did manage to keep himself above the law. He was forced to give up his office, but he was not treated the same way as the other defendants. His associates served time in jail. He received a large government pension and retired to a lovely home in San Clemente. I think people still wonder whether the concept of equal justice under the law really applies if one climbs high enough in terms of wealth, power or influence. All of my life as a lawyer and judge, I have tried to make the idea of equal justice mean something. I have always tried to treat white-collar criminals like other criminals. It still bothers me that Richard Nixion escaped that equal treatment. I feel that if he had been convicted in my court, I would have sent him to jail."[6]

Contrasted with his statements while he still held office, in his Memoirs the former

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[6] Sirica, Judge John J., To Set the Record Straight, Norton, 1979, p. 325.

president admitted breaches of fiduciary duty such as:

"In the April 30 (1974) speech I gave the impression that I had known nothing at all about the cover-up until my March 21 meeting with Dean. I indicated that once I had learned about it I had acted with dispatch and dispassion to end it. In fact, I had known some of the details of the cover-up before March 21 and when I did become aware of their implications, instead of exerting presidential leadership aimed at uncovering the cover-up, I embarked upon an increasingly desperate search for ways to limit the damage to my friends, to my administration, and to myself."[7]

and,

"But these were still only excuses. They were not an accounting of my role. They were

[7] Nixon, R. Memoirs, p. 850

not explanations of how a President of the United States could so incompetently allow himself to get in such a situation. That was what people really wanted to know, and that was what my April 30 speech and all the other public statements I made about Watergate while I was President failed to tell them."[8]

and, in contemplation of resignation said:

"From a practical point of view, I also had to face the fact that if I decided to stay and fight, the outcome of the fight was all but settled; I would be defeated and dishonored, the first President in history to be impeached and convicted on criminal charges."[9]

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[8] Nixon, Richard M., Memoirs, p. 851

[9] Nixon, Richard M., Memoirs, p. 1056

Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1720

IN THE

Supreme Court of the United States

October Term, 1980.

PEOPLE VERSUS PORN (Profit of Richard Nixon), *et al.*,
Petitioners,

vs.

RICHARD MILHOUS NIXON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RICHARD NIXON IN OPPOSITION.

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Questions Presented.

1. (Assuming petitioners have not abandoned the issue in the court of appeals), does a former President have a right to remove a State court action to the district court where the claim for relief asserted in the State court purportedly arises from the federal officer's breach of fiduciary duty to federal taxpayers in violation of his federal Constitutional oath of office?

2. Do federal citizens and taxpayers have standing to sue a former President derivatively for the financial benefit of the United States on a claim of breach of fiduciary duty where the complaint: (i) fails to allege a claim-related violation of the taxing and spending power, (ii) does not disclose a prior request that the United States assert the claim directly in its own name, and (iii) fails to join the Attorney General as a party?

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7 Witkin, B.E., Summary of California Law (8th ed. 1974) Sec. 20, p. 5383 11

No. 80-1720

IN THE

Supreme Court of the United States

October Term, 1980.

PEOPLE VERSUS PORN (Profit of Richard Nixon), *et al.*,
Petitioners,

vs.

RICHARD MILHOUS NIXON,
Respondent.

BRIEF FOR RICHARD NIXON IN OPPOSITION.

Parties.

The parties to this case are correctly stated on the second unnumbered page of the amended petition for writ of certiorari, received by the Clerk on 14 April 1981 and by counsel for respondent on 21 April 1981.

Opinion Below.

The decision of the court of appeals, a memorandum rather than an opinion (Amended Pet., p. 21), is unreported (Rule 21(a), Ninth Circuit Rules).

Jurisdiction.

The judgment of the court of appeals was entered on 5 December 1980. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. §1254(1).[1]

Statement.

Petitioners, a nonprofit corporation and two individual federal taxpayers, filed an action for money damages and an accounting against the former President of the United States in the superior court of the State of California for the county of Santa Clara on 4 May 1978 (Amended Pet., pp. 22-32). The complaint sought relief in the name of the federal treasury and not for the individual benefit of the plaintiffs. On 13 July 1978, Mr. Nixon filed a timely petition for removal of the case to the district court in San Francisco, together with a bond on removal (Appellee's Brief below, p. 2).[2] On 18 July 1978, Mr. Nixon moved in the district court to dismiss the action on several grounds, including: (i) lack of subject matter jurisdiction, (ii) failure to state a claim upon which relief might be granted, and (iii) failure to join a party under Rule 19, F.R.Civ.P.

Thereafter, petitioners moved in the district court for an order remanding the action to the State court. After the cross motions had been briefed and argued orally, the district court (the late Hon. Albert C. Wollenberg) denied petition-

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[1]By letter dated 21 April 1981, the Clerk has advised counsel for respondent that the original petition was received by the Clerk on 5 March 1981 and returned to petitioners' counsel because the petition did not comply with Rule 33. An amended petition was received by the Clerk on 14 April 1981. Respondent's counsel in Los Angeles did not receive the amended petition from petitioners' counsel, or at all, until 21 April 1981.

[2]The facts cited hereinbelow are taken from the Brief for Appellee which was filed in the Ninth Circuit. A copy of that brief is being lodged concurrently with the Clerk of this Court. The facts appear in Mr. Nixon's brief below at pages 1-7.

ers' motion to remand and granted Mr. Nixon's motion to dismiss (Amended Pet., pp. 17-20). Petitioners took a timely appeal to the Ninth Circuit from the judgment of dismissal. On 5 December 1980, the court of appeals affirmed the judgment of dismissal in an unpublished memorandum decision (per Wright, Choy, and Ferguson, Circuit Judges) (Amended Pet., p. 21).

In their opening brief in the Ninth Circuit, petitioners failed to specify any error in respect to the district court's denial of petitioners' motion to remand the action to the State court.[3]

In their complaint, petitioners purport to sue for money on behalf of all taxpayers, including themselves, who paid taxes to the United States at any time after July, 1972. Their claim sounds in tort — breach of fiduciary duty — arising from an asserted trust and fiduciary relationship between Mr. Nixon, in his former capacity as President of the United States, and the taxpayers. The trust, petitioners allege, came into being when Mr. Nixon "willingly and voluntarily took the oath of office as President of the United States as prescribed in Section 1, Clause 5 of Article II of the Constitution of the United States."[4]

From that oath and the obligations attendant to the federal office, petitioners claim that an express trust came into being — with the former President as trustee and the federal tax-

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[3]See generally: Appellant's [sic] Opening Brief, etc., filed in the Ninth Circuit, esp. at p. 1; Brief for Appellee, p. 7, fn. 3; and Appellants' Closing Brief, etc., pp. 8-10.

[4]Petitioners, doubtless, meant to refer to Art. II, §1, cl. 8, which reads:

> "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.' "

payers as beneficiaries — under the law of the State of California (Calif. Civil Code, §§2228-2231, 2234, 2237-2238). In alleged violation of that State-created trust relationship, petitioners contend, the former President concealed from petitioners and other federal taxpayers "information about such facts known to said defendants with regard to Watergate and which have been subsequently, and within three years last past, sold to certain television networks, promoters, producers, newspaper publishers, magazine publishers, book publishers, dealers and distributors and others for profit [in violation of California law]." (Amended Pet., pp. 27-28).

Petitioners seek an accounting of Mr. Nixon's profits for the benefit of the Treasury after an allowance therefrom for petitioners' lawyers' fees in this case. In addition, petitioners seek punitive damages in an amount equal to 20% of Mr. Nixon's net worth.

ARGUMENT.

1. Petitioners Abandoned Their Attack Upon the Removal of the State Action to the District Court When They Failed to Specify in Their Opening Brief in the Ninth Circuit Any Error in the District Court's Denial of Petitioners' Motion to Remand the Case to State Court.

The first question presented in the amended petition was not properly preserved below in the direct appeal from the judgment in the district court. Petitioners now urge that they should have been allowed to pursue their complaint in the California courts — that their claims were based solely upon State law — and for that reason it was error for the district court to have denied petitioners' motion to remand (Amended Pet., pp. 4-11). This issue is not available to petitioners in this Court, because they failed to urge it in the Ninth Circuit in their opening brief. Indeed, in the court of appeals, petitioners did not rely exclusively on California law as their source of the rules of primary conduct for respondent. Instead, they argued both federal and California law, implicitly conceding that their State court complaint presented a federal question which justified removal.[5]

By eschewing the removal issue and limiting their appeal below to the question of their standing to sue *in federal court* as taxpayers, petitioners abandoned their right to urge in this Court that the district court erred in refusing to remand

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[5]Petitioners began their opening brief in the Ninth Circuit with this statement under the heading "ISSUES AND ARGUMENT" (p. 1):

> "Each of the Appellants is a beneficiary of the public trust and a fiduciary duty *now accepted as arising out of federal common law*, as well as statutory and case law of the State of California." [italics added]

The burden of the opening brief in the Ninth Circuit was that petitioners had standing to sue Mr. Nixon in the district court. Petitioners no longer pressed the removal/remand issue.

the case to the California superior court. Rules 28(a)(2) and (a)(4), F.R.App.P.; *Peck v. Shell Oil Co.*, 142 F.2d 141, 143 (9th Cir. 1944). Absent extraordinary circumstances which do not appear in this record, this Court will not review an issue which was not raised by the petitioners in the court below. *Lawn v. United States*, 355 U.S. 339, 362 n. 16, 78 S.Ct. 311, 324 n. 16 (1958). Cf. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976); *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 1471 n. 2 (1980).

In view of the fact that the Ninth Circuit chose to speak to the remand issue, we will address the question on the merits.[6]

2. Respondent Had Two Statutory Bases for Removal of This Federal Question Action: Remand Was Properly Denied.

Cutting through the complaint's irrelevant citations to the statutory trust law of California — and without regard to whether the action had been filed initially in federal court or was removed there by the defendant — the complaint presents a uniquely *federal* question: Whether the status of the occupant of the office of President of the United States and the incidents of the oath of that office, which is prescribed by the Constitution of the United States, create a derivative claim for money damages which may be enforced in the courts by federal taxpayers for the benefit of the federal Treasury? Such a federal question immediately triggers the removal statute. 28 U.S.C. §§1331 and 1441; *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L.Ed.

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[6]The Ninth Circuit said (Amended Pet., p. 21):

"The denial of plaintiffs' motion to remand was correct. The right of removal was absolute. *Willingham v. Morgan*, 395 U.S. 402 (1968)."

204 (1824); *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773 (1946).

There is a second ground for removal on the facts alleged in the complaint. Mr. Nixon is a former federal officer who is being sued for tort allegedly committed during, and in connection with, the execution of his former federal office. In such circumstances, Congress has conferred jurisdiction upon the district courts to accept removal of that action so that present and former federal officers — and the Government — will be assured of uniform interpretation of the rules governing the performance of federal official duty. 28 U.S.C. §1442(a)(1); *Willingham v. Morgan,* 395 U.S. 402, 89 S.Ct. 1813 (1969); *Camero v. Kostos,* 253 F.Supp. 331, 334-335 (D.N.J. 1966).

* * *

Petitioners seemingly ignore the jurisdictional statutes and contend, without legal authority, that removal should not have been allowed, because petitioners want a California court to adjudicate petitioners' theory that the President of the United States, acting in his official capacity, is regulated by the disparate rules of primary conduct announced by the 50 States for trustees of express trusts (Amended Pet., pp. 4-8). They do not explain why California's version of the law for private fiduciaries should have any more relevance to this federal taxpayers' claim than the law of any other State. Nor do petitioners even attempt to describe a rational system of choice of law rules which would allow a court to determine which State's law would govern the official conduct of the President of the United States.

Petitioners' reliance on the trial court decision in New York is entirely misplaced (Amended Pet., pp. 8-10).[7] The

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[7] *Jenkins v. The New York Times and H.R. Haldeman,* N.Y. Supr. Ct., No. 3106-78; S.D.N.Y. No. 78 Civ. 1451.

gravamen of that complaint was a criminal conviction which triggered application of a New York statute that did not depend upon the defendant's former status as a federal officer: Section 632-a, Chapt. 823, Laws of 1977 (N.Y.) (Amended Pet., pp. 46-49).

Further, petitioners' assertion that their complaint did not invoke federal question jurisdiction by its reference to the Constitutional oath of office (Amended Pet., pp. 11-12) is groundless. The gravamen of the complaint is the alleged breach of a fiduciary duty to federal taxpayers which existed, if at all, solely by reason of respondent's former status as President. If all reference to Mr. Nixon's official position were deleted from the complaint, there would be no colorable claim for relief stated in the pleading.

3. Petitioners Lack Standing to Sue.

The theory of standing which petitioners advocate is based upon a misapprehension of the federal taxpayer standing-to-sue cases.[8] Petitioners do not allege any wrongful exercise by the Government of the taxing and spending power (Amended Pet., pp. 12-13). Cf. *Flast v. Cohen, supra,* fn. 8. Rather, petitioners contend that the Government *properly* expended funds to investigate Watergate. Petitioners want respondent to reimburse the Treasury for those *proper* expenditures.

Also, petitioners have not alleged any facts which might invest them with the power as federal taxpayers and citizens to sue derivately for the United States in order to seek money damages for the federal Treasury. Decisions of the courts

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[8]See, *e.g.*, *Flast v. Cohen*, 392 U.S. 82, 88 S.Ct. 1942 (1968); *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597 (1923); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925 (1974); *United States v. Richardson*, 418 U.S. 166, 170-179, 94 S.Ct. 2940, 2943-2948 (1974). See also: *Duke Power Co. v. Carolina Environ. Study*, 438 U.S. 59, 98 S.Ct. 2620, 2633-2634 (1978).

of California and Illinois involving suits brought by State taxpayers are not illuminating on this issue (Amended Pet., pp. 5-6, 13-14). Until their action had been dismissed in the district court (Amended Pet., pp. 17-20), petitioners not only did not allege that they had requested the Attorney General to bring this claim in the name of the United States (Amended Pet., pp. 22-32), but also, petitioners did not even request the Government to bring this claim until after the civil action had been dismissed by the district court (Amended Pet., pp. 33-35).

Federal taxpayers may not sue in tort derivatively for the financial benefit of the United States. Congress has committed to the discretion of the Executive Branch — and in particular to the Attorney General — the function of managing and prosecuting all claims of the United States. See, *e.g.*, 28 U.S.C. §§511, 512, 514, 515(a), 516, and 519; *United States v. State of California,* 332 U.S. 19, 26-27, 67 S.Ct. 1658, 1662-1663 (1947); *United States v. Silliman,* 167 F.2d 607, 610-611 (3d Cir. 1948), *cert. den.* 335 U.S. 825, 69 S.Ct. 48 (1948); *Senate Select Com. on Pres. Campaign Activities v. Nixon,* 366 F.Supp. 51, 56 (D.C.D.C. 1973).

4. Independent Grounds to Sustain the Dismissal.

In addition to each of the jurisdictional failings, petitioners' complaint was properly dismissed for other reasons which the district court never had to reach.[9]

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[9]On appeal, a judgment should be affirmed if it is supported by any legal ground, whether or not it was passed upon by the trial court. *California Bankers Association v. Schultz,* 416 U.S. 21, 71, 94 S.Ct. 1494, 1522 (1974); *Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S.Ct. 307, 308 (1957); *Securities and Exchange Com. v. Chenery Corp.,* 318 U.S. 80, 88, 63 S.Ct. 454, 459 (1943); *Helvering v. Pfeiffer,* 302 U.S. 247, 251, 58 S.Ct. 159, 160 (1937).

First, the Attorney General was an indispensable party to this action who might have been joined under Rule 19, F.R.Civ.P. Petitioners simply elected not to join him. As the official charged by Congress with the duty to manage and to prosecute all claims of the United States, it was essential that the Attorney General be bound by the judgment in this action. Cf. *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738 (1970); *Price, Trustee v. Gurney*, 324 U.S. 100, 105, 65 S.Ct. 513, 516 (1945); *Tryforos v. Icarian Development Company, S.A.*, 518 F.2d 1258, 1264-1265 (7th Cir. 1976), *cert. den. sub nom. Manta v. Tryforos*, 423 U.S. 1091, 96 S.Ct. 887 (1976); *Stevens v. Loomis*, 334 F.2d 775, 778 (1st Cir. 1964); *Greenberg v. Giannini*, 140 F.2d 550, 554 (2d Cir. 1944) (per L. Hand, C.J.).[10]

Second, the complaint failed to state a claim upon which relief could be granted. No facts were alleged that respondent was a trustee, that a trust *res* existed at the time respondent took the Presidential oath, or that any trust existed while respondent occupied the office of President. In these circumstances the metaphor of a public office being a public trust will not suffice to apply trust law principles to a taxpayer action for money. Cf. *In re New Statehouse*, 37 Atl.

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[10]Learned Hand said in *Greenberg v. Giannini, supra*:

> "As for Giannini's motions to dismiss the complaints in both actions, it has been settled law for over a century * * * that the wronged corporation is an indispensable party to a shareholders' action. * * * It is hornbook law that the claim is the corporation's, and for that reason the delinquent directors will not be protected by any judgment which does not conclude the corporation. If they succeed in defeating the action, other shareholders may bring another; if the recovery is too little, the same thing is possible." [citations omitted].

Petitioners are suing derivatively for the corporate benefit of the United States but the United States could not be concluded by the judgment in this case, because the United States was not brought before the court.

2, 4 (R.I. 1897). See: A.L.I., *Restatement of the Law, Trusts, Second*, §2, p. 2 (1959); *op. cit.* at pp. 10-11. The funds which petitioners wish to subject to a trust did not come into existence until after respondent left office (the complaint alleges that the proceeds of the sale of the literary and performance rights came into existence within three years of the filing of the complaint — 4 May 1978 — which was after respondent left office in August, 1974). Since there was no trust *res* during the existence of the alleged fiduciary relationship, there could have been no trust. See, *e.g.*, B.E. Witkin, 7 *Summary of California Law* (8th ed. 1974), Trusts §20, at p. 5383; A.W. Scott, 1 *Scott on Trusts* (3d ed. 1967), §74; G.G. and G.T. Bogert, *The Law of Trusts and Trustees* (2d ed. 1965), §111, at p. 562. *Accord: Solomon v. Boschulte*, 200 F.2d 482, 483 (3d Cir. 1952); *Garcia v. United States*, 421 F.2d 1213, 1232 (5th Cir. 1970); *Hackner v. Morgan*, 130 F.2d 300, 303 (2d Cir. 1942). Cf. *Newman v. C.I.R.*, 222 F.2d 131, 135 (9th Cir. 1955).

Third, petitioners seek to expropriate respondent's post-employment literary property and performance rights through the device of a breach of trust action. Historic facts are not the subject of property. Facts cannot be owned. It is the manifestation of ideas about facts which may be the subject of intellectual property. M.B. Nimmer, 1 *Nimmer on Copyright*, §2.11, pp. 2-157 to 2-158 (1979). Absent a contract thereon,[11] neither the United States nor its taxpayers own the fruits of the literary expression of a former federal officer — even if his post-employment works concern his former official duties. If the literary work was not created as a part of the officer's official duty — these post-resignation mem-

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[11]Cf. *United States v. Snepp*, 444 U.S. 507, 100 S.Ct. 763 (1980), *rehrg. den.* 100 S.Ct. 1668 (1980).

oirs clearly were not — then the Government has no rights in the proceeds of the sale of such literary property. See, *e.g.*, *United States v. First Trust Company of Saint Paul*, 251 F.2d 686, 688 (8th Cir. 1958); *Public Affairs Associates, Inc. v. Rickover*, 268 F.Supp. 444, 448-449 (D.C.D.C. 1967) (on remand from 369 U.S. 111, 82 S.Ct. 580); *Bell v. Combined Registry Co.*, 536 F.2d 164, 168-169 (7th Cir. 1976). See: §§101 and 105 of the Copyright Act (17 U.S.C. §§101 and 105).

The gist of petitioners' florid presentation is that the courts may punish former federal officials for political acts by expropriating their post-employment earnings from the writing of memoirs or the giving of lectures. [12] Before former federal officers are to be subjected to damage actions at the whim of federal taxpayers who attack the content of books which politicians write, there will have to be considerable change in contemporary notions of the First Amendment and in the laws defining the Government's rights in the literary works of former federal officers.

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[12]Why else would petitioners end their brief with the reference to the *Snepp* case (Amended Pet., p. 16) — the rule of which depends upon the special secrecy contract which Central Intelligence Agency officers made as a condition of employment in their covert official duties?

Conclusion.

For the reasons stated, this taxpayers' action is entirely without merit. The petition for writ of certiorari should be denied.

Respectfully submitted,

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